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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, *et al.*,
*Petitioners,*

v.

MORTON HALPERIN, *et al.*,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

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## STATEMENT OF THE CASE

### A. Introduction.

On May 13, 1969, agents of the Federal Bureau of Investigation, acting at the direction of petitioners Nixon, Mitchell, and Kissinger, installed a warrantless wiretap on the Halperin family's home telephone. Although the purported purpose of the surveillance was to determine whether Morton Halperin was the source of unauthorized "leaks" of classified information, no such evidence was

gathered, and it is undisputed that the wiretap revealed nothing which cast doubt on Halperin's loyalty or discretion. (Pet. App. 59a; II J.A. 248, 253.) Nonetheless, petitioners continued the surveillance for twenty-one months and made no effort to limit it to conversations that might have been related to leaks. Consequently numerous conversations concerning personal and political matters were overheard, summarized, and disseminated. Among the items reported to the White House were conversations relating to Senator Muskie's presidential campaign and the views of Republican Senators on legislation relating to the war in Indochina. (I J.A. 254-255.)

The Halperin surveillance was the longest in a program conducted by petitioners that included seventeen wiretaps on thirteen government officials and four journalists.[1] In its summary of evidence supporting impeachment of petitioner Nixon, the House Judiciary Committee found that these wiretaps served "no lawful purpose of his office; they had no national security objective, although he falsely used a national security pretext to attempt to justify them. Information obtained from this surveillance was used by his subordinates, with his authorization or permission, for his political advantage; and the FBI records of electronic surveillance were concealed at his direction."[2] A Senate investigation found that the entire program "did not reveal the source of any leaks of classified data. . . but it did generate a wealth of information about the personal

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[1]Minority Memorandum on Facts and Law, Hearings Before the House Judiciary Committee Pursuant to H. Res. 803, Authorizing and Directing the Committee to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Impeach Richard M. Nixon, 93 Cong. 2d Sess. 62, 71 (July 22, 1974).

[2]Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, H. R. Rep. No. 93-1305, 93 Cong. 2d Sess. 146 (1974).

lives of the targets — their social contacts, their vacation plans, their employment satisfactions and dissatisfactions, their marital problems, their drinking habits, and even their sex lives [as well as] [v]ast amounts of political information . . . ."[3]

Petitioners contend that despite the broad and intrusive nature of the Halperin wiretap, they are not liable in damages to respondents for their decisions to initiate and continue the surveillance because they are absolutely immune and because they violated no law that was clearly established at the time of the wiretap. Because petitioners' brief states the facts in a highly selective fashion, it is necessary to provide the Court with a more complete history of the relevant events against which to measure petitioners' legal arguments.

**B. The Wiretap.**

The wiretapping program had its genesis in late April or early May 1969, when Nixon, Mitchell, and Kissinger, in consultation with FBI Director Hoover, decided that such a program was necessary to identify the source of leaks to the press. (Pet. Br. 1-3.) Nixon directed Kissinger to provide to the FBI names of individuals who had access to leaked information and who were suspected of leaking. (II J.A. 19, 61-62, 160.) Nixon further directed that Mitchell approve the wiretaps before the FBI initiated them. (II J.A. 61-63.) The reports from the surveillance were originally sent to Nixon, Kissinger, and occasionally Mit-

[3]Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess., Book II, 200 (1976). The committee also found that "[a]mong those who were incidentally overheard on one of the wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States who made plans to review a manuscript by one of the targets." (*Id.*)

chell, and in May 1970, Nixon assigned Haldeman to monitor the reports.

Petitioners assert that "Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks." (Pet. Br. 4 n.6.) However, the record indicates a different sequence of events leading to Halperin's selection.

Although petitioners had earlier decided to embark on a wiretap program, the event which triggered the first taps was a May 9, 1969 story by William Beecher in the *New York Times* describing the operational details of secret American B-52 bombing raids on Cambodia. (Pet. Br. 3.) At that time Halperin was working for Kissinger as Chief of the National Security Council Planning Group, having been recruited for this position by Kissinger. (II J.A. 195-196.) Prior to joining the NSC staff, Halperin had been a Deputy Assistant Secretary of Defense during the Johnson Administration.

Kissinger met with Halperin on May 9 and told him that he was suspected of being the source of the Beecher article. Halperin assured Kissinger that he was not and pointed out that he did not even have access to the information in the article. (I J.A. 214.)[4] Kissinger stated that he ac-

[4]Halperin also lacked access to much of the information which appeared in the news stories prior to May 9 that had alarmed Nixon and his advisors and had been the purported reason for initiating the wiretap program. (I J.A. 267, 319-320.)

cepted Halperin's assurances but said that a number of high level figures in the Nixon Administration were suspicious of Halperin and considered him disloyal. (I J.A. 214-215.) Accordingly, Kissinger told Halperin that he would cut off Halperin's access to sensitive information for a time so that if any more information leaked, Halperin could not be blamed. (I J.A. 215.)

On May 9, Kissinger also called Hoover and requested "a major effort" to find the source of the Beecher story. (I J.A. 170.) Later in the day, according to Hoover's memorandum, Hoover told Kissinger that "our investigation led to nothing very definite except the possibility that [Beecher's] story was primarily on informed speculation as there had been made available publicly a lot of source material from which he could draw his conclusions." (I J.A. 171.) Although Hoover concluded that the information might have come from the NSC staff, he also said that there was "a strong possibility" that the leak came from offices at the Department of Defense where scores of employees had access to the information. (I J.A. 173.) Hoover also told Kissinger that there was only "speculation" tying Halperin to the Cambodian bombing story and other leaks. (*Id.*) Hoover's comments about Halperin did not mention any adverse security information or any propensity to leak. (I J.A. 174.)[5]

On the day of the Beecher story, Kissinger directed his military assistant, Col. Alexander Haig, to draw up a list of those who had access to information about the bomb-

[5]Except for this brief flurry of activity on May 9, 1969, before the taps began (I J.A. 170-175), there is no indication that the FBI ever conducted any further investigation of Halperin in addition to the wiretap. There were no interviews, no physical surveillances, no lie detector tests, no attempts to contact journalists or FBI informants and no reports of any conclusion as to likely leakers. (Pet. App. 72a.)

ing campaign. (Haig Dep. 143.) Since Halperin did not have access to the published information, Haig did not include Halperin on the list which he prepared for Kissinger. (Haig Dep. 142-143.) Kissinger, however, instructed Haig to give to the FBI the names of four individuals who were not on Haig's list, including Halperin. (II J.A. 212-214.) Significantly, Kissinger listed none of the members of his staff who had access to the bombing information. (*Id.*)

While there was no evidence suggesting that Halperin was a likely leaker, there is much evidence suggesting that he was selected for other purposes. Kissinger later stated that the three members of his staff whose names he gave to Haig were individuals whom others in the Administration had urged him not to hire. (I J.A. 330-331; II J.A. 198-199.) Halperin in particular had been the subject of strong letters to Nixon and Mitchell from Senator Barry Goldwater urging that Halperin and other hold-overs from the Johnson Administration not be retained. (I J.A. 167-169.) Furthermore, Haldeman and the Chairman of the Joint Chiefs of Staff had raised objections with Kissinger over hiring Halperin. (II J.A. 196-198.) It thus appears that Kissinger selected Halperin as a wiretap target not because he suspected him of leaking, but rather to bolster Kissinger's standing in the White House and to diffuse the criticism of his staff appointments.

On May 10, 1969, Haig, acting on Kissinger's instruction, visited William Sullivan – the Assistant Director of the FBI in charge of the Intelligence Division – and requested electronic surveillance of the four individuals identified by Kissinger. (Haig Dep. 135-36; I J.A. 175-176.) Haig also requested that no records of the surveillance be maintained and that if possible the Department of Justice not be informed. Haig further proposed that he would come to Sullivan's office to review the

results of the surveillance rather than receiving reports at his own office. (I J.A. 175-176.)

Sullivan forwarded Kissinger's request to Hoover, who submitted a memorandum seeking the Attorney General's approval for the four surveillances. (I J.A. 177.) Although Department of Justice regulations required that such applications include "a general description of the activities subject is engaged in and the type of information which it is anticipated will be obtained through the electronic coverage [and] the period of time for which approval is requested" (I J.A. 163), this memorandum provided only the following supporting information:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.

(I. J.A. 177.) Notwithstanding the lack of any pertinent derogatory information about Halperin or any other stated reason to wiretap him, Mitchell signed the memorandum on May 12, 1969, thereby approving the surveillance.[6]

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[6]Petitioners have never identified any information in Halperin's security file indicating a propensity to leak. The "unfavorable" information to which they refer (Pet. Br. 4 n.5) concerns two minor instances where Halperin erred in filling out security forms during his employment at the Department of Defense. (A detailed analysis of these incidents is set forth at I J.A. 268-277.) When Halperin transferred from the Defense Department to the NSC at the outset of the Nixon Administration, Kissinger reviewed these incidents and deter-

From May 13, 1969 to February 10, 1971 the wiretap was continuously in place on the Halperin home telephone.[7] During this period Morton Halperin had little or no access to sensitive information because Kissinger never resumed Halperin's access after cutting it off on the same day he selected Halperin for surveillance. (I J.A. 214-216.) Halperin left the NSC staff four months later on September 19, 1969, although Kissinger attempted to persuade him to remain, even offering to resume Halperin's full access to sensitive information. (II J.A. 229.) At Kissinger's request, Halperin did agree to assume a consultant status with the NSC, which he maintained until the following May, but he had no access to any classified NSC information in that capacity. (I J.A. 216.)

Despite Halperin's limited and eventual total lack of access to sensitive information and the absence of any evidence that he was engaged in leaking, petitioners never reconsidered the propriety of the Halperin wiretap, even though Department of Justice regulations required that an authorization for a national security wiretap be renewed every 90 days. (II J.A. 134-135.) Indeed, petitioners rejected suggestions from experienced officials of the FBI that the tap be terminated. Two days after the tap was in-

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mined that Halperin was suitable for employment and the accompanying high level clearances. (I J.A. 327-330.) Indeed, the FBI security report on Halperin to the NSC did not even mention these two incidents. (J.A. 298-299.) The inconsequential nature of Halperin's ommissions is demonstrated by the fact that the Defense Department, the Central Intelligence Agency, and the Atomic Energy Commission subsequently approved him for numerous highly restricted top secret clearances. These clearances remained in effect until Halperin resigned from the National Security Council staff in September 1969. (I J.A. 287-293.)

[7]The logs show that there were interceptions beginning on May 9, 1969 when the FBI appears to have unilaterally initiated the surveillance. (Jones Dep. 6; Belter Dep. 61-62.)

stalled, Sullivan notified Hoover that no information related to leaks had been uncovered. (I J.A. 178.) On June 20, 1969, Haig, acting for Kissinger, accepted Sullivan's recommendation to discontinue the wiretaps of some suspected leakers, but not the one on Halperin even though "nothing of late relevant to leaks" had been discovered. (I J.A. 183.) On July 8, 1969, Sullivan reported to Hoover that "nothing has come to light of significance from the standpoint of the leak in question" and that he believed that Halperin knew his phone was tapped. Accordingly, Sullivan suggested to Haig that "some of this coverage be removed." (I J.A. 184.) In July 1970, the FBI agent in charge of the surveillance wrote to Sullivan that he had not "noticed much info of value in recent months" and recommended that the wiretap be discontinued. (I J.A. 206.) Finally on February 10, 1971, the wiretap was removed (I J.A. 211), although there is no indication that this was due to any action undertaken by petitioners.[8]

The FBI employees who monitored the phone listened to all conversations, tape recorded ones they thought to be significant, and prepared written logs of some conversations. (Belter Dep. 37-38, 92.) The log entries, which were forwarded to Sullivan's office, ranged from verbatim texts of conversations to simple notations of the times of calls and the identity of the conversants. (Belter Dep. 37-40, 63; Jones Dep. 25.) Of the many thousands of calls which were overheard, 638 calls were logged. (I J.A. 227.)

[8]According to Acting Director of the FBI, William D. Ruckelshaus, it was Hoover's practice to discontinue warrantless wiretaps shortly before congressional appearances so that he could report a minimum number of taps in operation if questioned. The Halperin wiretap was terminated just before Hoover's appearance before the House Appropriations Committee. (Report of the House Committee on the Judiciary, *supra* at 148-149.)

Twenty-seven percent (173) of these calls were between Mr. and Mrs. Halperin; forty-three percent (272) of the calls were between Mrs. Halperin – who had never had access to, or was alleged to be leaking, classified information – and third parties; only twenty-nine percent (186) of the logged calls were between Mr. Halperin and third parties. (*Id.*) The three Halperin children were each specifically identified once in the logs, and 13 other entries in the logs note calls involving unidentified children. (*Id.*) The remaining logged calls involved guests who used the Halperin home telephone.

At the outset of the surveillance, Haig, and on at least one occasion Kissinger, went to Sullivan's office to read the logs. (I J.A. 179-180; Sullivan Dep. 80.) Beginning at the end of May 1969, the FBI summarized the logged information in letters which were sent to both Nixon and Kissinger over Hoover's signature. (I J.A. 264; Sullivan Dep. 42-43; Haig Dep. 41-43.) Copies of at least three of these letters were also sent to Mitchell. (I J.A. 249, 264; II J.A. 162.) Nixon, Mitchell, Kissinger, and Haldeman were at least generally familiar with the contents of the letters because they either read them or were briefed on them, and all of them discussed the contents with at least a few other individuals. All of them were aware that no information was being obtained relating to leaks and that much personal and political information was being gathered and disseminated. (II J.A. 98-100, 162, 238-239, 300-301.)

For example, in December 1969 petitioners learned from the wiretap that Morton Halperin was assisting former Secretary of Defense Clark Clifford in writing an article for *Life Magazine* criticizing the Nixon Administration's Vietnam policy. (I J.A. 191-192.) This information was used by White House staff members "to springload

ourselves to a position from which we can effectively counter whatever tack Clifford takes." (I J.A. 193.) In May 1970, the FBI prepared a memorandum for Hoover summarizing the information which had been sent to Nixon and Kissinger since the announcement on April 30, 1970 of the invasion of Cambodia. (I J.A. 201-202.) The "highlights" from the Halperin tap included information that Halperin planned to resign his consultant's position with the NSC to protest the invasion, that Halperin believed the President would attack North Vietnam and Laos, that Halperin agreed to work with Senator Fulbright in opposing the war, and that Halperin and others were forming an organization to oppose the war. (*Id.*)

On May 12, 1970, Nixon and Hoover met to discuss the wiretap program. Nixon directed that thereafter the summary letters should be directed to Haldeman, who would screen them and pass pertinent information to Nixon and Kissinger. (I J.A. 203-205; II J.A. 293-296.) From this point until the termination of the tap in February 1971, the FBI sent Haldeman sixteen summary letters which contained substantial amounts of information pertaining to the political activities of Halperin and others. These letters reported on Halperin's contacts with Senators, including their private views on pending legislation to end the Vietnam war, the efforts of various citizens' groups to lobby against the war, development of a foreign policy position by Common Cause, and the activities of the Muskie presidential campaign in which Halperin became involved as a foreign policy advisor. A sampling of these summary letters is set out in Volume I of the Appendix at pages 252-256.

Following the termination of the wiretap, vigorous efforts were made to conceal it from authorities lawfully entitled to be informed of it. At Nixon's direction all records were

removed from the FBI and stored first with Assistant Attorney General Robert Mardian and then in John Ehrlichman's White House safe. (I J.A. 260-261, 264.) Following the indictment of Daniel Ellsberg in June 1971 for his participation in the publication of the Pentagon Papers, his counsel were repeatedly told in response to discovery requests that he had not been overheard on any FBI wiretap. In fact, Ellsberg had been overheard at least fifteen times on the Halperin wiretap and had been mentioned in one of the summary letters sent to Kissinger and Nixon. (Report of the House Committee on the Judiciary, *supra* at 154; letter dated September 3, 1969; I J.A. 259, 264.)

In February 1973, *Time Magazine* informed the White House that it had learned of the wiretapping program, but the White House denied the story. (Report of the House Committee on the Judiciary, *supra* at 154-155.) In March 1973, at the confirmation hearings of L. Patrick Gray to be Director of the FBI, Gray was asked whether the FBI had conducted the wiretaps described in the *Time* story, and he answered that the FBI did not have records reflecting the existence of such taps. (*Id.*) Nixon, who knew that the FBI files were incomplete because of his orders to hide the records in the White House, did not intervene to order Gray or any other official to advise the Committee of the facts. (II J.A. 111-115.)

The existence of the wiretap program first became known to respondents on May 10, 1973. The previous day, William D. Ruckelshaus, Acting Director of the FBI, filed a memorandum with the trial judge in the Ellsberg case, advising him that he had just learned that Ellsberg had been overheard on the Halperin wiretap while a guest of the Halperins. (I J.A. 262, Ruckelshaus Dep. 6.) The following day, the judge ordered the release of this

memorandum and shortly thereafter Ruckelshaus recovered the Halperin wiretap records from Ehrlichman's safe and returned them to the FBI. (I J.A. 262-263, 264.)

### C. District Court Proceedings.

Respondents filed suit against petitioners Kissinger, Mitchell, Haldeman, and others in June 1973 alleging that the wiretap violated their rights under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Although then President Nixon had publicly announced on May 23, 1973 that he had authorized the entire wiretap program (I J.A. 212-213), he was not named as a defendant when the suit was filed. In July 1974, the House Judiciary Committee voted to impeach Nixon, and one of the articles of impeachment included the wiretap program.[9] On August 9, 1974, Nixon resigned from office, and on September 8, 1974, President Ford pardoned him for all offenses he may have committed against the United States while in office. Moreover, by that time several depositions in this case had demonstrated that Nixon was personally involved in the Halperin wiretap. *See Halperin* v. *Kissinger,* 401 F. Supp. 272 (D.D.C. 1975). It was only after all these events that respondents amended their complaint on September 30, 1974 to include the former President as a defendant.

After the parties had completed discovery, they cross moved for partial summary judgment on the issue of liability. The District Court accepted petitioners' contention that the wiretap was installed to investigate leaks, despite factual disputes on this issue. (Pet. App. 68a.) The Court also found that "defendants' determination that Title III was inapplicable to the Halperin wiretap was

[9]Debate on Articles of Impeachment, House Committee on the Judiciary, 93d Cong. 2d Sess. 369-447 (1974).

reasonable during the period of the surveillance" and that there was "no genuine issue of fact in the record controverting this good faith belief on defendants' part." (Pet. App. 66a.) This ruling was based on the Court's view that the scope of the national security proviso to Title III, 18 U.S.C. § 2511(3), was unsettled at the time of the Halperin surveillance, prior to the rulings in *United States* v. *United States District Court,* 407 U.S. 297 (1972) (holding warrants required for internal security surveillances) and *Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir.) (*en banc*), *cert. denied,* 425 U.S. 944 (1976) (holding warrants required and Title III applicable in all cases where target of surveillance is not the agent or collaborator of a foreign power). (Pet. App. 63a-66a.)

Turning to respondents' Fourth Amendment claims, the District Court assumed that the warrant requirement was inapplicable (Pet. App. 67a, 70a) and examined whether the surveillance satisfied the reasonableness requirement of the Amendment. Without passing on the propriety of selecting Halperin, the Court characterized the wiretap as "a dragnet which lacked temporal and spatial limitation" and which represented "the antithesis of the 'particular, precise, and discriminate' procedures required by the Supreme Court in numerous Fourth Amendment cases." (Pet. App. 69a.) Accordingly, the Court ruled that the "surveillance constituted an invasion of plaintiffs' privacy and freedom of expression" and was "per se unreasonable under the Fourth Amendment and unjustified by any possible exception thereto." (Pet. App. 69a-70a.)

In determining the liability and responsibility of the individual petitioners, the District Court carefully distinguished between their different roles in the wiretap:

—Nixon was found liable for having authorized the overall program, for overseeing it, and for failing to take any affirmative action to terminate the Halperin

surveillance or reduce its scope when he was aware that no information relating to leaks was being obtained and that much non-pertinent information was being gathered. (Pet. App. 70a-73a.)

—Mitchell was found liable for failing to carry out his review and renewal obligations under Justice Department regulations, both when the tap was initiated and throughout its twenty-one month life. *(Id.)*

—Haldeman was found liable for failing to recommend termination of the tap when he knew that the summary letters contained no information relating to leaks but much non-pertinent information, and for having disseminated the information for purposes unrelated to the tap's original justification. (Pet. App. 72a-73a.)

The District Court ruled that these petitioners cannot claim "absolute immunity for their excessive actions." (Pet. App. 73a.) The Court also ruled that petitioners Nixon, Mitchell, and Haldeman were not entitled to any good faith defense for the overly broad surveillance. (Pet. App. 73a.) This ruling was based on two different findings. First, as an objective matter, "their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights." (Pet. App. 73a.) Second, the Court found that under all the circumstances — "a twenty-one month wiretap continuance without fruits or evidence of wrong-doing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents" — petitioners had failed to establish a subjective good faith defense. (Pet. App. 74a.)

The District Court granted summary judgment in Kissinger's favor because of his "inactive role and [his]

lack of oversight authority." (Pet. App. 75a.) The Court found that Kissinger had "provided Mr. Halperin's name to the FBI since he appeared to meet the criteria established for those suspected of leaking classified information." *(Id.)* Although Kissinger received reports from the surveillance, the Court found that he had regarded Nixon, Mitchell, and Hoover "as responsible for determining when to terminate the wiretap." *(Id.)*

In a subsequent opinion the District Court refused to award compensatory damages because respondents had not alleged any physical or economic injury. (Pet. App. 55a-56a.) The Court also ruled that punitive damages were inappropriate, even though petitioners had failed to establish a good faith defense, because "their conduct cannot fairly be characterized as wanton, reckless or malicious disregard of plaintiffs' rights. . . ." (Pet. App. 56a.) Accordingly, the Court ruled that respondents were entitled to only nominal damages of one dollar each. *(Id.)* At that time, the Court also permanently enjoined defendants – including the Director of the FBI who had been sued in his official capacity for purposes of equitable relief – from making any use or disclosure of respondents' intercepted communications and ordered them to place exonerating information in Halperin's security file, including Kissinger's sworn statement that he knew of no wiretap information impugning either Halperin's loyalty or his discretion. (Pet. App. 59a.)

**D. The Court of Appeals Decision.**

On cross appeals, the Court of Appeals ruled for respondents in all respects. Relying on this Court's intervening decision in *Butz* v. *Economou,* 438 U.S. 478 (1978), the Court of Appeals rejected the claim of Mitchell, Haldeman, and Kissinger that they are entitled to

absolute immunity. (Pet. App. 36a-37a.) It also reversed the summary judgment in favor of Kissinger, finding material facts to be in dispute regarding his responsibility for the wiretap. (Pet. App. 49a-50a.)[10]

With respect to Nixon's claim that he is entitled to greater protection because of his former office, the Court held that a former President is not entitled to absolute immunity from damage liability arising from an unconstitutional wiretap and rejected his contention that presidential absolute immunity is constitutionally mandated. (Pet. App. 42a-45a.) Not only did the Court find that the Constitution is silent with respect to any such immunity (Pet. App. 42a), but it also concluded that article 1, section 3, clause 7, which provides that an impeached President may be criminally tried, implies that "incumbency does not relieve the President of the routine obligations that confine all citizens." (Pet. App. 43a.) The Court also rejected the argument that the doctrine of separation of powers requires absolute immunity since such a holding would abdicate the judiciary's role in protecting constitutional rights. (Pet. App. 44a-45a.)

Turning to the "prudential grounds" which petitioners so vigorously press in this Court, the Court of Appeals weighed the advantages and disadvantages of presidential liability for constitutional violations and rejected the assertion that "the repercussions of finding liability would be drastically adverse." (Pet. App. 42a.) Noting that "the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights," the Court concluded that "if we are serious about providing a remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for

[10]Kissinger does not challenge that ruling in this Court. (Pet. Br. 10 n.11.)

holding inferior officials liable for constitutional violations while immunizing those higher up." (Pet. App. 45a-46a.) Relying on the principle that "[n]o man in this country is so high that he is above the law," the Court applied the logic of *Economou* to Presidents. (Pet. App. 49a.)

At the same time, the Court reasoned that "suits that may successfully be pursued against a President will be quite rare." (Pet. App. 45a.) This is so because the doctrine of qualified immunity, as articulated by this Court in *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-249 (1974), provides a "sliding scale" of protection according to the responsibilities of the official, which necessarily gives the maximum protection to a President. (Pet. App. 46a-47a.) Consequently, he will be inhibited in the discharge of his duties only from the clearest violations of the constitutional rights of citizens, and in most cases "plaintiffs would have substantial difficulty in defeating a President's claim of immunity." (Pet. App. 47a.)[11]

With respect to respondents' statutory claim, the Court held that Title III would apply to "any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities" and remanded for a determination

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[11] Judge Gesell filed a concurring opinion urging that "a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim." (Pet. App. 53a.) In his view, "the plaintiff must establish after the completion of discovery and before trial commences, not merely the existence of a genuine dispute as to some material fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." (Pet. App. 52a-53a.) Judge Gesell did not, however, suggest that respondents in this case failed to meet this higher standard.

of the purpose of the wiretap. (Pet. App. 28a.)[12] In so ruling, the Court indicated that it had substantial doubts about whether the wiretap was initiated and conducted for the alleged purpose of identifying leakers. In particular, it noted its doubt about the period after May 1970 when Halperin had resigned as an NSC consultant, had lacked access to sensitive information for the preceeding year, and continuous surveillance had revealed no evidence that he was a leaker. (Pet. App. 26a.) It also noted that after Halperin left the NSC staff in September 1969, the national security rationale "would seem almost equally attenuated." (Pet. App. 27a.) Finally, the Court specifically directed the District Court to examine respondents' contention that Halperin was originally selected for surveillance to bolster the political credibility of Kissinger's staff appointments. (Pet. App. 27a-28a.)

With respect to the constitutional claims regarding the institution of the wiretap, the Court of Appeals rejected the District Court's view and held that a warrant was required at the initiation of the surveillance (Pet. App. 29a-31a) and remanded for a determination of whether petitioners can avoid liability based on a good faith defense due to the uncertainty of the law in 1969. (Pet. App. 31a, 41a.) In addition, the Court affirmed the District Court's rulings that the continuation of the surveillance was constitutionally unreasonable (Pet. App. 29a) and that petitioners are not entitled to qualified immunity for this aspect of respondents' claims. (Pet. 40a-41a.) However, the Court remanded for a determination of when the wiretap became unreasonable. (Pet. App. 29a.) The Court stressed that in "a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or

[12]Petitioners have not appealed from this decision or asserted absolute immunity from Title III liability. (Pet. Br. 10 n.16.)

period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act." (Pet. App. 41a.)

With regard to the appropriate level of damages for Fourth Amendment violations, the Court directed that further proceedings be held, ruling that "even if a constitutional violation inflicts only intangible injury, compensation is still appropriate" (Pet. App. 33a.), a ruling that petitioners have not challenged in this Court. (Pet. Br. 10 n.16.) However, in light of its reinstatement of the statutory claims, the Court noted that respondents could not recover simultaneously under both Title III and the Constitution. (Pet. App. 31a.)

E. **Proceedings In This Court.**

After petitioners filed their petition for a writ of certiorari, respondents moved in the District Court to disqualify government counsel from continuing joint representation of petitioners on two grounds. First, they pointed out that because of petitioners' differing roles, responsibilities, and defenses, conflicts of interest existed among them which should prevent joint representation and that such joint representation also made it impossible for respondents to attempt to settle with one or more of the four petitioners so long as they all were represented by the same attorney. Second, respondents argued that the Department of Justice could not adequately represent these individuals because the institutional interests of the goverment were not congruent with those of the petitioners. In both instances, the petition for certiorari had brought these conflicts into sharp focus. On the same day respondents filed their motion in the District Court, they also filed a motion in this Court for leave to defer filing

their brief in opposition until after the District Court ruled on the disqualification motion. On March 17, 1980, this Court denied respondents' motion to defer. On March 28, 1980, the District Court denied the disqualification motion without prejudice to renewal at a later date. The petition for certiorari was granted on May 19, 1980.

## SUMMARY OF THE ARGUMENT

### I.

In *Butz* v. *Economou,* 438 U.S. 478 (1978), the Court held that federal executive officials have a qualified rather than absolute immunity from damages liability in suits alleging violations of constitutional rights. This decision was based on the conviction that no man in this country is above the law and that the higher the official the greater the risk of abuse of power and therefore the greater the need for damage remedies to deter unconstitutional conduct and to compensate its victims. Since petitioner Nixon was directly responsible for a massive invasion of respondents' Fourth Amendment rights, the rule established in *Economou* applies to him. Petitioners urge, however, that the President is entitled to absolute immunity because the Framers of the Constitution intended to immunize the President from civil suit and because the special functions of the presidency require such immunity. Both contentions are without merit.

The Framers clearly intended that the President was to be subject to the law rather that above it. In providing that he could be impeached for crimes against the government, they also intended that injured citizens would continue to have recourse against even an impeached President under the common law.

Petitioners' policy argument is based in large part on substantial overstatement of the implications of the decisions below. This case involves a continuous twenty-one month violation of respondents' Fourth Amendment rights through a surreptitious wiretap, and therefore affirmance will not involve the courts in routine oversight of the vast range of the President's discretionary responsibilities. There may well be other torts for which absolute immunity is appropriate and other presidential functions toward which the courts should show deference. This case, however, only requires the courts to exercise their well-established role in protecting the constitutional rights of citizens against executive action which exceeds the limitations imposed by the Constitution. Indeed, petitioners concede that in some circumstances the President is subject to suits for injunctive relief, and it is difficult to understand why they resist judicial review of his conduct in the context of damage actions.

Petitioners also contend that damage actions against a President are unnecessary because he is sufficiently constrained by the system of checks and balances, including the possibility of impeachment. It is obvious that those constraints had no prophylactic effect on the conduct which led to this case, and damage actions are therefore a useful addition to the arsenal of checks on official misconduct. Moreover, the institutional mechanisms on which petitioners would exclusively rely do not offer any compensation for citizens whose rights are violated, and this Court has held damage remedies should be available in such situations. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Petitioners further contend that qualified immunity is insufficient to protect the President from intolerable distractions and burdens imposed by pending litigation. This argument overlooks the fact that qualified immunity provides a sliding scale of protection which varies accor-

ding to an official's position. Accordingly, it necessarily affords the greatest degree of protection to a President because of the scope of his discretion, the responsibilities of his office, and the exigent circumstances in which he often must act. Thus, a President will become personally involved in litigation only when it is clearly shown that he directly participated in violations of constitutional rights, and suits alleging anything less will meet an early dismissal. If a sitting President should be sufficiently implicated in a damage suit that his active participation is required — and none has — district courts have broad discretion to minimize the burden on him and could even stay proceedings until he left office.

II.

Petitioners Kissinger, Mitchell, and Haldeman recognize that it is settled under *Economou* v. *Butz* that they are entitled to only qualified immunity, but they argue that if petitioner Nixon is afforded absolute immunity, they should receive the same measure of protection on a derivative theory. The premise of this argument is the assumption that these three petitioners were mere agents executing petitioner Nixon's orders. To the contrary, Kissinger, Mitchell, and Haldeman all had distinct roles in the Halperin wiretap involving broad discretion, and it is for these individual roles that they are sued, rather than for any advice they may have furnished to Nixon. Kissinger selected wiretap targets, decided when to terminate the surveillances, and was responsible for choosing Halperin. Mitchell, who supervised the wiretaps, was required to approve specific taps and periodically review them under Department of Justice regulations, and his failure to do either resulted in the overly broad and excessively lengthy surveillance of the Halperin family. Haldeman monitored the information gleaned from the wiretap and used it for improper political purposes.

Furthermore, there is no legal basis for petitioners' derivative immunity argument. This Court has repeatedly held that Congressional employees are not entitled to derivative immunity under the Speech or Debate Clause when they engage in unlawful conduct even though a member of Congress may be immune for authorizing the conduct. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). Similarly, even if petitioner Nixon is absolutely immune for authorizing and overseeing the wiretap program, petitioners Kissinger, Mitchell, and Haldeman should not have a derivative absolute immunity for their actions in conducting the Halperin wiretap.

## III.

Petitioners contend that they are entitled to qualified immunity as a matter of law because the requirements of the Fourth Amendment with respect to national security wiretaps were unsettled at the time of the Halperin wiretap. For the same reason, they also contend that the decisions below unfairly imposed retroactive liability.

The principal flaw in these arguments is that petitioners have not established on their motion for summary judgment that the Halperin wiretap was conducted for bona fide national security purposes and there is substantial evidence in the record that it was conducted for improper political purposes. In 1967, this Court held that the Fourth Amendment applies to electronic surveillance of telephones calls, although the Court reserved the question of whether the warrant requirement applies in national security cases. *Katz* v. *United States*, 389 U.S. 347. Therefore if the 1969-1971 Halperin wiretap was not conducted for national security purposes, it plainly violated the Fourth Amendment. Petitioners cannot escape liability

by labeling a political intelligence operation a "national security" operation, and the undisputed factual predicate which is necessary to establish their right to summary judgment on their qualified immunity and retroactivity defenses is missing.

A second flaw in petitioners' argument is that since *Katz* only reserved the question of whether warrants are required in national security wiretaps, it was settled in 1969 that the reasonableness requirement of the Fourth Amendment applied with full force to the Halperin wiretap. The elements of Fourth Amendment reasonableness in the electronic surveillance area had been spelled out prior to 1969 in cases such as *Berger* v. *New York*, 388 U.S. 41 (1967). Since the Halperin wiretap was conducted for twenty-one months without producing any evidence of leaking and without any attempt to minimize the interception, logging, and dissemination of non-pertinent conversations, it violated law that was clearly established before the tap was installed. Therefore, the legal predicate for petitioners' qualified immunity and retroactivity arguments is also missing.

Petitioners are not entitled to summary judgment on their qualified immunity defense for the additional reason that they have failed to establish the absence of a factual dispute on whether they initiated and conducted the Halperin wiretap in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. It is well established that the affirmative defense of qualified immunity requires both a showing that the defendant did not violate any clearly established right of which he knew or should have known and that he acted in subjective good faith. *E.g.*, *Wood* v. *Strickland*, 420 U.S. 308 (1975). In this case, the evidence of petitioners' political rather than national security purposes in initiating and conducting the Halperin wiretap and their indifference to the prolonged

violation of respondents' privacy is sufficiently strong to preclude a finding of good faith on petitioners' motion for summary judgment.

## ARGUMENT

### I. PETITIONER NIXON IS NOT ENTITLED TO ABSOLUTE IMMUNITY FROM CIVIL LIABILITY FOR DELIBERATE VIOLATIONS OF RESPONDENTS' FOURTH AMENDMENT RIGHTS.

The question presented here is whether a former President enjoys absolute immunity from civil liability for actions he took in office which violated Fourth Amendment rights. The case does not involve violations of other rights, and affirmance of the decision below certainly will not authorize "routine oversight" by the judiciary of all presidential actions. (Pet. Br. 17-18, 33, 34.) In *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court ruled that the rights of citizens and the interests of efficient government will be best accommodated if federal executive officers are afforded qualified rather than absolute immunity in cases alleging knowing violations of constitutional rights. *Economou* therefore provides the analytic framework for answering the question presented here, and the logic of *Economou* requires that its holding be applied to the chief officer of the executive branch. Petitioners, however, seek to relitigate the Court's determinations in *Economou,* since neither history nor public policy justify a different immunity for the President than is available to all other executive officials.[13]

[13]The immunity that petitioner Nixon seeks is not in fact absolute because he has not sought review of his liability for damages under Title III, 18 U.S.C. § 2520. (Pet. Br. 10 n.16.) Therefore, even if he prevails on the question presented of absolute immunity from

## A. The Analytic Framework.

In ruling on the degree of immunity which is appropriate for any given government official, this Court has considered a number of factors which should guide its decision with respect to the immunity of Presidents. First, it has determined that while officials may be absolutely immune from liability for common law torts which they inflict in the course of the duties, violations of constitutional rights are treated differently. Second, it has determined that damage actions are an important means of securing constitutional rights because they compensate the victim for his loss and deter official misconduct. Third, the Court has generally afforded officials a qualified rather than absolute immunity for constitutional torts, although the scope of this qualified immunity expands in proportion to the broader duties and discretion of high-ranking officials. Fourth, where the Court has granted absolute immunity, it has done so only with respect to participants in judicial or quasi-judicial proceedings where misconduct is deterred by the open adversary system and abuses are correctable through appellate procedures. Finally, the Court has based its immunity decisions on a careful analysis of the official's function which gave rise to the injury and has refused to extend absolute immunity categorically on the basis of titles or positions. Each of these factors is examined below in greater detail.

In *Economou,* the Court concluded that absolute immunity for federal officers who knowingly and deliberately violate constitutional rights "is contrary to the course of decision in this Court from the very early days of the

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respondents' constitutional claims, he still will face trial on the statutory claims, which depend on the sharply disputed factual issue of whether at all times over the twenty-one months of the wiretap, its "primary purpose [was to protect] national security information against foreign intelligence activities." (Pet. App. 28a.)

Republic." 438 U.S. at 487. While federal officials enjoy absolute immunity for common law torts arising from discretionary actions taken within the outer perimeter of their responsibility,[14] the Court concluded that "it cannot be doubted that these officials. . . are subject to the restraints imposed by the Federal Constitution." 438 U.S. at 495. Actions which knowingly and deliberately violate a citizen's Fourth Amendment rights are not within any official's line of duty because the Amendment is a restraint and a limitation on governmental action. *Id.; Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 392 (1971). As James Madison stated when he offered the Bill of Rights in the First Congress, "If [these rights] are incorporated into the constitution . . . they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive." I Annals of Congress 439 (1789).

The Court also stressed in *Economou* that "[i]n situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees" and extension of absolute immunity to all federal officials would "seriously erode" these guarantees. 438 U.S. at 505-506. As the Court has recognized, damage actions play an important role in protecting constitutional rights because they compensate victims of unlawful official conduct and deter officials from such conduct. *Carlson* v. *Green,* 100 S. Ct. 1468, 1473 (1980); *Butz* v. *Economou, supra,* 438 U.S. at 505, *Robertson* v. *Wegmann,* 436 U.S. 584, 590-91 (1978).

The twin policies of compensation and deterrence do not diminish when high ranking officials are responsible for unconstitutional conduct. First, the victim's need for compensation plainly is not reduced whatever the rank of

[14] *See, e.g., Barr* v. *Matteo,* 360 U.S. 564 (1959); *Spalding* v. *Vilas,* 161 U.S. 483 (1896); *Kendall* v. *Stokes,* 44 U.S. (3 How.) 87 (1845).

the responsible official. Second, in a statement that is strikingly applicable to the White House wiretapping program, the Court has stressed that the higher the official, the greater the opportunity for abuse of power, and therefore the greater the need to deter constitutional violations through damage suits:

> The broad authority possessed by [federal executive] officials enables them to direct their subordinates to undertake a wide range of projects — including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale.

*Butz* v. *Economou, supra,* 438 U.S. 505-506.

This Court has also recognized "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Economou* v. *Butz, supra,* 438 U.S. at 506. However, in order to balance protection of officials with protection of citizens' constitutional rights, the Court has concluded that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506-507. Thus, in the area of constitutional torts, the Court has

held that federal officials are entitled to the same qualified immunity defense available to state officials. *Id.* at 507.

This qualified immunity is a flexible one which takes into account the official's position, the scope of his responsibility and discretion, and the exigencies of the situation giving rise to the claim against him. "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-248 (1974).

Although the Court in *Economou* held that as a general rule federal executive officials exercising discretion are entitled only to qualified immunity in damage suits arising from unconstitutional actions, it acknowledged that there are "exceptional situations where. . . absolute immunity is essential for the conduct of public business." 438 U.S. at 507. Thus, it has long been recognized that the "special functions" of judges and of prosecutors in their advocacy roles "require a full exemption from liability." 438 U.S. at 508. In examining the rationale for absolute immunity for judges and prosecutors, the Court noted that "[t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process," and that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 438 U.S. at 512. Judges are insulated from political pressure, they are governed by precedent, they make deci-

sions on the basis of public adversary presentations, and above all, their errors can be corrected on appeal. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Stump* v. *Sparkman*, 435 U.S. 349, 369, 369-370 (1978) (Powell, J., dissenting); *Apton* v. *Wilson*, 506 F.2d 83, 93-94 (D.C. Cir. 1974). Prosecutors are similarly hemmed in by the public adversary system and the availability of appeal. Because there are similar safeguards in agency adjudications, the Court was willing to apply absolute immunity to administrative law judges and those who initiate and prosecute agency actions. *Butz* v. *Economou, supra*, 438 U.S. at 512-517.

To be sure, the Court has extended absolute immunity to judges, prosecutors, and their agency counterparts in part because of their vulnerability to suit by dissatisfied litigants and the inhibition that the threat of suit would pose to the exercise of their duties. 438 U.S. at 509-511, 513, 515. However, such vulnerability alone, without the concomitant safeguards of the judicial process, is not enough to justify absolute immunity. If it were, police officers would be absolutely immune because they are the "segment of the executive branch of a state government that is most. . . frequently exposed to situations which can give rise to claims" of constitutional violations. *Scheuer* v. *Rhodes, supra*, 416 U.S. at 244. Nevertheless, "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." *Pierson* v. *Ray, supra*, 386 U.S. at 555. Similarly, if vulnerability to suit alone were a sufficient justification for absolute immunity, state governors, national guard commanders, teachers, and prison officials would be absolutely immune, but the Court has held that they are not. *Scheuer* v. *Rhodes, supra*, 416 U.S. 232; *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Procunier* v. *Navarette*, 434 U.S. 555 (1978). *See Imbler* v. *Pachtman*, 424 U.S. 409, 436 (1976) (White, J., concurring). These decisions demonstrate that the absolute im-

munity of judges and prosecutors is justified not only by their vulnerability to suit, but also by the fact that the judicial process provides safeguards to protect citizens who may be harmed by their actions.

In determining whether a particular official is entitled to absolute immunity, the Court also has distinguished between the official's different functions. "[T]he immunity conferred might not be the same for all officials for all purposes." *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the same official may enjoy absolute immunity for some functions but only qualified immunity for others. In *Imbler* v. *Pachtman, supra*, 424 U.S. 409, the Court held that a prosecutor is absolutely immune for acts performed within the scope of his duties in conducting a criminal prosecution. At the same time the Court was careful to note that it was not deciding whether absolute immunity is required for "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430-431.[15] The importance of such a functional analysis of an official's varying duties is emphasized by the fact that three members of the Court in *Imbler* believed that a prosecutor should have absolute immunity from suits alleging the knowing use of perjured testimony, but have only a qualified immunity for suits alleging unconstitu-

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[15]In so ruling the Court noted that several Courts of Appeals have ruled that prosecutors do not enjoy absolute immunity for their functions outside the judicial process. 424 U.S. at 430 n.31. Following *Imbler*, the Courts of Appeals have continued to apply this distinction. *Lee* v. *Willins*, 617 F.2d 320 (2d Cir. 1980); *Hampton* v. *Hanrahan* 600 F.2d 600, 631 (7th Cir. 1979), *rev'd in part on other grounds*, 100 S. Ct. 1987 (1980); *Jacobson* v. *Rose*, 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979); *Slavin* v. *Curry*, 574 F.2d 1256, 1264 (5th Cir. 1978); *Briggs* v. *Goodwin* 569 F.2d 10, 20 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), and cases cited therein; *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977); *Kipps* v. *Ewell*, 538 F.2d 564 (4th Cir. 1976).

tional suppression of evidence. 424 U.S. 432-447 (White, Brennan, Marshall, J.J., concurring). In *Butz* v. *Economou* the Court also implicitly recognized that the same official may enjoy absolute immunity for some of his functions but qualified immunity for others. This distinction is evident from the fact that agency officials who enjoy absolute immunity when they initiate administrative proceedings also perform other functions in the agency to which absolute immunity does not attach.

The Court has demonstrated the importance of functional analysis not only in cases concerning the immunity of executive branch officials, but also in cases concerning judicial and legislative immunity. For example, the Court recently held that a state supreme court is absolutely immune with respect to its legislative function in promulgating rules for attorneys' conduct, but not with respect to its independent enforcement function in initiating disciplinary proceedings against members of the bar. *Supreme Court of Virginia* v. *Consumers Union of the United States*, 100 S. Ct. 1967 (1980). *Cf. Zarcone* v. *Perry*, 572 F.2d 52 (2d Cir. 1978).

The Court has also employed functional analysis in construing the scope of the immunity constitutionally conferred on members of Congress by the Speech or Debate Clause. For example, in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the Court held that a Senator is not immune from libel suits arising from the distribution of defamatory information in press releases and newsletters. Although a "speech by Proxmire in the Senate would be wholly immune. . . neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process." *Id.* at 130. Even though the Senator urged that such materials were means of communicating with his colleagues and constituents, the Court ruled that this "informing func-

tion" was not protected by the Speech and Debate Clause because it is "not a part of the legislative function or the deliberations that make up the legislative process." 443 U.S. at 133. *See Gravel* v. *United States*, 408 U.S. 606, 621, 624-626 (1972); *United States* v. *Brewster*, 408 U.S. 501, 512-513 (1972); *United States* v. *Johnson*, 383 U.S. 169, 172 (1966).

Against this backdrop, we turn to the question of whether petitioner Nixon has carried "the burden of showing that public policy requires" absolute immunity from civil liability for his role in surreptitiously authorizing and overseeing an unconstitutional wiretap. *Butz* v. *Economou, supra,* 438 U.S. at 506. An examination of the historical materials and the policy considerations proffered by petitioner demonstrates that they are insufficient, in connection with the actual functions involved here, to alter the balance struck by the Court in *Economou*, which serves simultaneously to protect constitutional rights by permitting damage actions and to protect officials with qualified rather than absolute immunity.

### B. There Is No Evidence That The Framers Of The Constitution Intended The President To Be Absolutely Immune From Civil Liability For Constitutional Violations.

Petitioners assert that the Framers of the Constitution intended that the President would be absolutely immune from civil liability and that impeachment, the election process, public opinion, and the system of checks and balances would be the exclusive remedies for presidential misconduct. (Pet. Br. 20-24.) Unable to cite any positive

evidence for their position in the constitutional debates, petitioners assert that "[n]othing in the entire course of these deliberations suggests in any way that the President was also to be liable to suit for money damages arising out of the conduct of his Office." (Pet. App. 23-24.) It can be said just as accurately that nothing in the Framers' deliberations suggests that the President was to be immune from suits for money damages arising out of the conduct of his office.[16]

What is clear from the debates and contemporaneous writings of the Framers is that they intended the President to be subject to the law rather than above it, in contrast to the King of England. Thus, James Wilson told the Pennsylvania ratifying convention that "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836). *See The*

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[16]Petitioners find some support for their position in Mr. Justice Story's Commentaries and in a debate in the First Senate. (Pet. Br. 20.) With due respect to Mr. Justice Story, who was not a member of either the Constitutional Convention or any of the state ratifying conventions, his views in this regard are representative of what this Court has recently termed "an archaic view of the doctrine of separation of powers." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). The extreme view expressed by Vice President Adams and Senator Ellsworth that no process can issue against the President because it would stop the whole machinery of government also has not stood the test of time. *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974); *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (*en banc*); *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

*Federalist*, No. 69 (A. Hamilton) at 445-454 (Modern Library ed.); Pet. Br. 21.

In arguing that impeachment should be the exclusive remedy for presidential misconduct, petitioners misunderstand the Framers' intentions. In adopting the Impeachment Clause, the Framers provided a mechanism which deprives a miscreant President of office but leaves any other punishment to the law. Art. I, § 3; Art. II, § 4. Thus Hamilton wrote that following impeachment and removal from office, the President "would afterwards be liable to prosecution and punishment in the ordinary course of law." *The Federalist* No. 69 at 446 (Modern Library ed.). In another paper, he stated that the President was "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law." *Id.* No. 77 at 502. Similarly, James Iredell told the North Carolina ratifying convention that an impeached President "is further liable to a trial at common law [and] may receive such common-law punishment as belongs to a description of such offenses, if it be punishable by that law." IV Elliot, *supra* at 114. James Wilson wrote that "the trial and punishment of an offense on impeachment, is no bar to a trial of the same offense at common law." I *The Works of James Wilson* 324 (1967).

There is no indication that these references to the "common law" and to the "ordinary course of law" were restricted to criminal prosecutions. Indeed, the Framers were acutely aware that civil damage actions against government officials had been an important means of securing civil liberties in England. *Payton* v. *New York*, 100 S. Ct. 1371, 1391 (1980) (White, J., dissenting); *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961); *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886). It is therefore unlikely that they intended to immunize the President from such

suits at the same time that they made him subject to the law. Thus, the Court of Appeals was correct in concluding that "[b]y contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine obligations that confine all citizens." (Pet. App. 43a.)

Another flaw in petitioners' argument is that it overlooks the Framers' intention that impeachment was designed to deal only with crimes against society or the government and not offenses against individuals. As Governor Johnston stated in the North Carolina ratifying convention:

> If an officer commits an offense against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment extends to high crimes and misdemeanors in a public office. It is a mode of trial pointed out for great misdemeanors against the public.

IV Elliot, *supra* at 48.

Wilson wrote that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." I *The Works of James Wilson* 426 (1967). Consequently, "[i]mpeachments, and offenses and offenders impeachable, come not, in those descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects. . . ." *Id.* at 324. Iredell expressed the same idea to the North Carolina ratifying convention:

> [The power of impeachment] is calculated to bring them to punishment for crime which it is not

> easy to describe, but which every one must be convinced is a high crime and misdemeanor against the government. . . .[T]he occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot easily be reached by an ordinary tribunal.

IV Elliot, *supra* at 113. *See The Federalist*, No. 65 (A. Hamilton) at 423-424 (Modern Library ed.).

Since the Framers intended that impeachment would not reach all presidential misconduct, they could not also have intended that it was the exclusive remedy for all misconduct, thereby immunizing a class of wrongs which a President might inflict on individuals but which might not call for impeachment. Such a scheme would be wholly at odds with their overriding purpose of making the chief executive personally accountable, in sharp contrast to the King of England. It would also be wholly at odds with the "very essence of civil liberty" which is "the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Court has recently held that it will not deprive a plaintiff of his right to pursue a damage action against a federal official arising from a violation of constitutional rights unless there is an "explicit congressional declaration that persons [so] injured. . . .may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *Carlson* v. *Green*, *supra*, 100 S. Ct. at 1472. Similarly, the Court should not deprive respondents of their right to sue a former President without an explicit declaration by the Framers that they intended to bar such suits.

### C. Public Policy Supports Qualified Rather Than Absolte Immunity For A Former President Who Deliberately Violated The Fourth Amendment Rights Of Citizens.

Petitioner Nixon raises many of the same policy arguments in favor of absolute immunity which the Court rejected in *Economou*. However, all of the factors which led to the conclusion that cabinet officers are not entitled to absolute immunity for violations of constitutional rights are present in this case, and the fact that a former President is a defendant here should not lead to a different result in the circumstances of this case. There is a compelling need to authorize damage remedies for the abuses involved here in order to achieve the twin policies of compensation and deterrence, and there is no adequate substitute for damages in a case such as this. Moreover, since this case involves deliberate violations of constitutional rights through a surreptitious surveillance program, it raises Fourt Amendment issues that are appropriate for judicial consideration and does not enmesh the courts in reviewing presidential functions which may be outside the scope of judicial review. Furthermore, the doctrine of qualified immunity adequately protects the President in the lawful discharge of his duties.

First, this case plainly involves a massive invasion of constitutionally protected privacy which merits compensation. Petitioners used the wiretap to invade both private political discussions and intimate husband-wife conversations. Petitioner Nixon's callous indifference to respondents' rights is demonstrated by his failure to terminate the wiretap long after Morton Halperin had left the government and it was apparent that no information relating to leaks was being obtained. Constitutional rights

have been violated, respondents deserve a remedy, and there is no alternative to damages. "For people in [respondents'] shoes, it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 410 (Harlan, J., concurring). *See Carlson* v. *Green, supra,* 100 S. Ct. 1468; *Davis* v. *Passman,* 442 U.S. 228, 242 (1979).

Second, in addition to compensating respondents, a suit for damages against petitioner Nixon is also useful to deter future violations of individual constitutional rights at the highest level of government where the potential for abuse is the greatest. As this case amply demonstrates "the greater power of such [high-ranking] officials affords a greater potential for a regime of lawless conduct. Exten- Government operations offer opportunities for unconstitutional action on a massive scale." *Butz* v. *Economou, supra,* 438 U.S. at 506. This observation necessarily applies with greatest force to Presidents, and they should be inhibited from authorizing and utilizing unconstitutional surveillance programs. The public interest will best be served if any future President who is tempted to repeat such abuses thinks twice because of this lawsuit. "A federal official contemplating unconstitutional conduct. . .must be prepared to face the prospect of a *Bivens* action." *Carlson* v. *Green, supra,* 100 S. Ct. at 1475.[17]

Petitioners present essentially three arguments to support their contention that the special functions of the presidency require absolute rather than qualified immunity: (1) damage suits will result in an improper judicial in-

[17]The Court has also held that even if damage suits serve no general deterrent purpose, or an alternative remedy exists, a plaintiff injured by the constitutional tort of a federal official is still entitled to seek compensation. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 397. *See id.* at 407-408 (Harlan, J., concurring).

trusion into the President's constitutional responsibilities; (2) the system of checks and balances, including Congressional oversight, the possibility of impeachment, popular elections, public opinion, media reporting, and judicial review in the form of equitable remedies are sufficient to prevent presidential abuses; and (3) even with qualified immunity, the burdens and risks of litigation are too great for the President to bear and will inhibit the fearless and decisive exercise of his authority.

1. Much of petitioners' argument concerning judicial intrusion into the President's constitutional responsibilities is an overstatement of what is involved in this case and the implications of the decisions below. All that the lower courts held, and all that this Court need hold, is that the President is not entitled to absolute immunity for deliberate violations of the Fourth Amendment rights of individual citizens. The Court has not in the past held "that every tort by a federal official must be redressed in damages," *Davis* v. *Passman, supra,* 442 U.S. at 248, and it need not so hold here.

Furthermore, by applying the functional analysis which has characterized the Court's approach to immunity questions, the Court need only focus on the President's role in authorizing surveillance programs which exceed the limitations imposed by the Fourth Amendment on the actions of all governmental officers. There may well be presidential functions for which absolute immunity from personal damages might be appropriate, even if the plaintiff pleads a constitutional violation. For example, a citizen claiming to be aggrieved by a President's commitment of troops to combat, or his negotiation of a treaty, might encounter a more substantial claim to absolute immunity than is raised here. Similarly, a suit against the President for damages alleging a pattern of racial or sexual discrimination in the

appointment of judges, ambassadors, or cabinet officers would raise different questions than does this case. Thus, this case does not raise the specter of "recurring judicial oversight of the President's discretionary actions" (Pet. Br. 33), or "a substantial intrusion into the President's constitutional responsibilities" (Pet. Br. 26), but only an adjudication that petitioners' surreptitious surveillance program exceeded the restraints imposed by the Fourth Amendment and resulted in a massive invasion of respondents' rights of privacy and free expression.[18]

When a President abuses his power by violating the constitutional rights of a citizen, the courts have a duty to vindicate those rights, and the doctrine of separation of powers is not to the contrary. As the court recently stated:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional

[18]There is a logical inconsistency in petitioners' argument that damage actions will improperly embroil the judiciary in review of Presidential action. Petitioners argue that damage actions are unnecessary because, among other constraints, "the existence of judicial review of presidential actions serves to contain and correct the unauthorized exercise of the President's powers." (Pet. Br. 31, footnote omitted.) But such review involves as much judicial oversight of presidential action as a suit for damages. If respondents had learned of the wiretap on their telephone while it was in progress and had sued for injunctive and declaratory relief, the courts would have been drawn into evaluating the reasonableness of the President's action to at least as great a degree as they are in this damage action. Thus, it cannot be judicial oversight to which petitioners object, for they profess to welcome it (Pet. Br. 31) so long as it does not entail money damages.

> rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

*Davis* v. *Passman supra,* 442 U.S. at 242. *See Marbury* v. *Madison, supra,* 5 U.S. (1 Cranch) at 163. Such judicial vigilance for constitutional rights is entirely consistent with James Madion's purpose when he offered the Bill of Rights to the First Congress: "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights. . . ." 1 Annals of Congress 439 (1789).

Moreover, the doctrine of separation of powers is not intended to foster unreviewable independence or to exalt any officer of the government, but rather to distribute and control power throught checks and balances.

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental power among three departments, to save the people from autocracy.

*Myers* v. *United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Thus, vindication of constitutional rights through damage actions in the courts serves rather than frustrates the separation of powers doctrine. This Court has determined in *Economou* that damage actions are an effective means of fencing in executive power when it

threatens the constitutional rights of individual citizens, and that determination applies with full force when the violator is a former President.

Because petitioners assert that the Halperin wiretap was conducted for legitimate national security purposes, they contend that the courts should not impose "even the slightest inhibition on the vigorous and resolute discharge of the President's constitutionally based responsibilities." (Pet. Br. 37-40.) In their view, leaks to the press seriously interferred with the conduct of foreign policy, and the wiretap program was necessary to stem the leaks. (Pet. Br. 1-3.)[19] However, this Court, has stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). Consequently, even legitimate claims of national security have not dissuaded this Court from adjudicating constitutional rights.[20] Indeed, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934).

The instant case does not present foreign affairs questions such as who is the lawful sovereign or representative of a foreign country, or whether a treaty requires the President to order troops to a foreign country, but rather the question of whether the invasion of the Halperins'

[19]Whether, contrary to the findings of all the Congressional investigations into this program *(see* pp. 1-2, *supra)*, the Halperin wiretap was conducted to investigate leaks is a disputed issue in this case.

[20]*E.g. United States* v. *United States District Court*, 407 U.S. 297 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *United States* v. *Robel*, 389 U.S. 258 (1967); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 169 (1804).

privacy violated the Constitution. *See Zweibon* v. *Mitchell,* 516 F.2d 594, 623-624 (D.C. Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976). Such a question requires vigilance rather than deference from the courts and is surely not one entirely exempt from judicial inquiry, as petitioners urge.[21].

2. Petitioners' suggestion that a President is sufficiently constrained by such checks and balances as congressional oversight, the possibility of impeachment, popular elections, public opinion, media reporting, and judicial review overlooks the obvious fact that none of these mechanisms deterred petitioner Nixon from the conduct which led to this action. This failure eloquently testifies to the wisdom of an additional check in the form of a damage remedy for those whose constitutional rights are violated. Furthermore, none of the mechanisms mentioned by petitioners would afford any compensation to respondents. They are not remedial safeguards of an individual's rights, like appeals to correct prosecutorial or judicial misconduct, which justify absolute immunity for judges and prosecutors in their courtroom roles.

Moreover, with the exception of elections, all of these constraints are also applicable to other executive branch officers, but that did not lead the Court in *Economou* to conclude that damage actions are unnecessary. The impeachment clause of the Constitution applies to all "civil officers of the United States," Art. II, § 4, yet that fact did not alter this Court's decision in *Economou* that federal

[21]There is also great irony in petitioners' suggestion that this case calls for extreme judicial deference on national security grounds. The White House wiretapping program represents as vividly as any other recent event the executive branch's proclivity to label matters "national security" in order to escape scrutiny of its actions. (Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, *supra* at 146.)

executive officials should be subject to damage actions for conduct which violates constitutional rights. *See Nixon* v. *Sirica*, 487 F.2d 700, 711 n.50 (D.C. Cir. 1973) (*en banc*). Thus, the checks on which petitioners would exclusively rely do not displace the role that a private damage action plays.

It is also unrealistic to believe that the great engines of impeachment, a national election, or even congressional oversight will deter a President's unlawful actions toward one individual or family. These mechanisms are better gauged for wide-ranging abuses against our system of government itself than for the violation of one family's rights. If Mr. Nixon's only offense had been the wiretap of the Halperin telephone without all the other abuses associated with Watergate, it is most unlikely that the impeachment process would have begun. Indeed, the Framers never contemplated that impeachment would reach all personal injuries. *See* pp. 37-38, *supra*. Similarly, elections reflect the popular will which may well applaud the invasion of the constitutional rights of unpopular individuals, yet the Bill of Rights was designed precisely to restrain such abuses, particularly when they are tolerated or encouraged by the majority. The individual suit for damages is therefore a valuable and necessary complement to the arsenal of checks and balances which preserves the integrity of official conduct and protects constitutional rights in this country.

3. Petitioners' final policy justification for absolute presidential immunity is that the inhibitory effect of potential litigation and liability are too great for the President to bear even though he may rely on an extensive qualified immunity. Again it is important to remember that the only actions which will be inhibited are those which violate clearly established individual constitutional rights. Rather than being confronted with "vast potential

liability . . . for virtually every presidential decision" (Pet. Br. 27), a President will only be threatened with personal liability when he violates an individual's constitutional rights. With the inhibition so limited, there is no reason why the balance struck in *Economou* for cabinet officers should be struck differently for Presidents.[22]

Petitioners also substantially overstate the likelihood that a President actually will be distracted and burdened by defending a damage action. First, it should be remembered that the doctrine of qualified immunity is available "in varying scope . . . the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247. Under this sliding scale of immunity, the President is entitled to the maximum degree of protection because of the breadth of his discretion, the responsibilities of his office, and the speed with which he must act in pressing circumstances.

The ease with which petitioner Nixon has escaped the toils of litigation with an early motion for dismissal is demonstrated by the cases cited by petitioners at page 25 of their brief. In those cases, the plaintiffs failed to demonstrate that the President was a proper party to the suit. Only in rare occasions like this suit, where it is clear that the President is a proper defendant because of his direct personal involvement, is he likely to lose a motion

[22]As the Court of Appeals correctly noted, "there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer." (Pet. App. 48a.) Therefore, if the balance is to be struck differently for a President than for a cabinet officer, the difference must be justified in terms of the office rather than the individual's personal interests. *See* Pet. Br. 26.

for dismissal or summary judgment and be required even to respond to discovery. *See Butz* v. *Economou, supra,* 438 U.S. 507-508. In this case, Nixon publicly accepted responsibility for the wiretap program, and depositions of more than twenty other parties and witnesses demonstrated that he was directly involved before he was joined as a defendant. *Halperin* v. *Kissinger,* 401 F. Supp. 272 (D.D.C. 1975). Moreover, damage suits do not appear to have presented serious problems for either former President Ford or President Carter:

> According to presidential counsel Lloyd Culter's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "To be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

"Nixon Ready To Testify," The National Law Journal, 27 (Sept. 29, 1980).

When litigation follows departure from office – as has been the pattern with petitioner Nixon – it does not intolerably distract a President from the discharge of duties. However, if a suit against an incumbent survived preliminary motions and required responses to discovery, the district courts have broad power to regulate such discovery to avoid undue burden on a party. Rule 26(c), Fed. R. Civ. P. A sitting President can, without doubt, expect the greatest deference under this provision. Indeed, to the extent it might be necessary for an incumbent to par-

ticipate in litigation, the district court could stay those proceedings until he left office.

Even if an incumbent were required to respond to discovery, the burden would not be as great as petitioners suggest. In this case Dr. Kissinger defended himself while performing his duties as Secretary of State. By agreement with the plaintiffs (I J.A. 26), he responded to discovery first by providing answers to interrogatories (I J.A. 309-354) and then by submitting to a deposition that lasted less than three hours. (II J.A. 192, 254). There is no indication that those burdens of litigation detracted from his performance as Secretary of State. Moreover, from the earliest days of the Republic to the present, courts have demonstrated consideration and ingenuity to alleviate the burden on Presidents whose testimony has been required. In 1818, President Monroe was subpoenaed to appear at a court martial but was permitted to file answers to written interrogatories. *Nixon* v. *Sirica, supra,* 487 F.2d at 710 n 42. In 1975, President Ford was permitted to testify at a trial through videotape. *United States* v. *Fromme,* 405 F. Supp. 578 (E.D. Cal. 1975). Similar procedures can also be used if an incumbent is ever required to appear as a defendant in a civil damage action.

Petitioners also contend that litigation against a President is inappropriate because it will inevitably violate either the "presumptive privilege for Presidential communications," *United States* v. *Nixon,* 418 U.S. 683, 708 (1974), or the absolute privilege for state and military secrets, *United States* v. *Reynolds,* 345 U.S. 1 (1953). Like the "disruption of duties" argument, this is mere speculation with no basis in the facts of this litigation. Despite the taking of 1900 pages of depositions, it was not necessary to litigate a single claim of privilege, other than Mr. Nixon's broadscale objection to testifying at all. This case has

involved no classified material whatsoever, except for Nixon's gratuitous reference in his deposition to a few bits of classified information which none of the parties have sought to rely on and which were filed under seal by agreement. (II J.A. 36.)

The privilege for presidential communications is based on the need for candid advice, *United States* v. *Nixon, supra,* 413 U.S. at 705-706, and even though cabinet officers and state governors need candid advice, that has not been a sufficient reason to afford them absolute rather than qualified immunity. *Butz* v. *Economou, supra,* 438 U.S. 478; *Scheuer* v. *Rhodes, supra,* 416 U.S. 232. Moreover, since the privilege for presidential communications "calls for great deference from the courts," *United States* v. *Nixon, supra,* 418 U.S. at 706, it can be outweighed only by the strongest showing that requested information is necessary for "the legitimate needs of the judicial process." *Id.* at 707. The state secrets privilege, on the other hand, is absolute, *United States* v. *Reynolds, supra,* 345 U.S. 1, so that if it is properly raised and upheld it cannot be outweighed by even the strongest showing of need. *See Halkin* v. *Helms,* 598 F.2d 1 (D.C. Cir. 1979). Accordingly, there is no danger that information falling within this privilege will be disclosed.

* * *

It is clear that none of petitioners' policy arguments warrant absolute immunity. On the other hand, the most profound policy reason for rejecting absolute immunity was identified by the Court in *Economou:*

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> "No man in this country is so high that he is above the law. No officer of the law may set

> that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

438 U.S. at 506, *quoting United States* v. *Lee*, 106 U.S. 196, 220 (1882). Accordingly, the decision of the Court of Appeals rejecting absolute presidential immunity should be affirmed.

## II. EVEN IF PETITIONER NIXON IS ENTITLED TO ABSOLUTE IMMUNITY, PETITIONERS KISSINGER, MITCHELL, AND HALDEMAN ARE NOT.

Petitioners Kissinger, Mitchell, and Haldeman urge that if the President is entitled to absolute immunity, then they too should enjoy the same protection because they were acting at the President's direction. This argument fails to recognize the distinct role each petitioner played in the Halperin wiretap and the distinct claims against them. Furthermore, such a derivative theory of immunity is as "contrary to the course of decision in this Court" as was the claim that all federal officials enjoy absolute immunity. *Butz* v. *Economou, supra,* 438 U.S. at 487.

Kissinger, Mitchell, and Haldeman seek to portray themselves as mere agents executing Nixon's explicit orders to wiretap Morton Halperin. To the contrary, each of them had wide discretion in the wiretap program, each was solely responsible for actions that contributed to the invasion of respondents' privacy, and each, at one time or another, could have prevented or ended the wiretap. Their concession that they "undoubtedly exercised some discretion in carrying out the President's directives" (Pet. Br. 47 n.40) is an understatement that borders on misstatement.

The record indicates that, while Nixon authorized and oversaw the wiretap program as a whole, the selection of targets was left to Kissinger, and he instructed his deputy, Col. Haig, to provide Halperin's name to the FBI. Furthermore, Kissinger requested the FBI to continue the wiretap on Halperin even when he agreed to the discontinuance of others, and the documentary evidence plainly demonstrates that the FBI regarded Kissinger as centrally responsible for the program. As Mitchell stated in his deposition, "Dr. Kissinger, having initiated the taps, that [sic] it would be his determination as to when they came off." (II J.A. 166; *See* II J.A. 46.) Since Kissinger had the authority to provide the names of those to be tapped and the authority to terminate the taps, he is sued for his role in targeting Halperin, for failing to terminate the wiretap, and for reviewing and utilizing the information obtained through the wiretap.

The basis of Mitchell's liability was spelled out clearly by the District Court. (Pet. App. 71a, 73a.) Nixon directed that the wiretaps were to be conducted by the FBI under Mitchell's supervision after Kissinger furnished the names of targets. (II J.A. 19-20, 60-63, 160.) Mitchell signed the authorization for the Halperin wiretap even though it did not contain the information required by Department of Justice regulations to justify a warrantless surveillance. Thereafter, he occasionally received copies of the summary letters. "At no time did he formally re-evaluate the fruits of the wiretap or the need for its continuance, as required by Justice Department regulations." (Pet. App. 71a.) Similarly, Haldeman is sued, *inter alia*, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification. (Pet. App. 73a.) Contrary to petitioners' insistence (Pet. Br. 47-50), the suit against Kissinger, Mit-

chell, and Haldeman is not based on the advice they gave the President to establish the surveillance program but on their actions within their independent spheres of responsibility.

Moreover, there is no basis in law for derivative immunity, except in the most unusual circumstances. This Court has consistently held that officials are not immunized from liability for damages when they follow orders from superiors who may enjoy immunity. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), the Court held that the Speech or Debate Clause afforded absolute immunity to members of the House of Representatives who voted for a resolution authorizing the arrest and imprisonment of Kilbourn for his refusal to respond to the questions of an investigating committee, even though the Court held that the authorization was in excess of the House's authority. The Court did not, however, extend this absolute immunity to the Sergeant-at-Arms of the House who actually arrested and jailed Kilbourn, and he was required to stand trial in a civil suit for these torts. If petitioners' theory of derivative immunity were sound, the Sergeant-at-Arms would have been entitled to avail himself of the absolute immunity which protected the members of the House.

Consistent with the rejection of derivative immunity in *Kilbourn,* the Court in modern times has adhered to "the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Powell* v. *McCormack,* 395 U.S. 486, 504 (1969). *Accord, Doe* v. *McMillan,* 412 U.S. 306, 315-317 (1973); *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967); *McSurely* v. *McClellan,* 553 F.2d 1277 (D.C. Cir. 1976) (*en banc*), *cert. dismissed as improvidently granted,* 438 U.S. 189 (1978). *See Gravel* v. *United*

*States, supra,* 408 U.S. at 618-621 Similarly, even if the President enjoys absolute immunity, his aides who participate in unconstitutional activity still are responsible for their discretionary acts and do not enjoy derivative immunity.

## III. PETITIONERS ARE NOT ENTITLED TO PREVAIL ON THEIR MOTION FOR SUMMARY JUDGMENT ON EITHER THEIR QUALIFIED IMMUNITY DEFENSE OR THE DOCTRINE OF NON-RETROACTIVITY.

Petitioners contend that at the time of the Halperin wiretap the constitutional standards pertaining to national security wiretaps were unsettled. From this assertion they raise two closely related defenses. First, they contend that they are entitled to prevail under the doctrine of qualified immunity because they did not violate any clearly established law of which they should have known. Second, petitioners contend that the decisions below unfairly impose liability by retroactively applying decisions which clarified the status of national security wiretaps under the Fourth Amendment. *United States* v. *United States District Court,* 407 U.S. 297 (1972); *Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976).

These contentions are without merit for three reasons which are detailed below but can be briefly summarized. First and foremost, there is a sharp factual dispute, which cannot be resolved on respondents' motion for summary judgment, over whether the Halperin wiretap was undertaken for national security purposes or for political reasons. If, as respondents contend, the Halperin wiretap was initiated and continued for poltical purposes unrelated to bona fide national security interests, then it

plainly violated Fourth Amendment strictures which were settled in 1969. Petitioners cannot escape the requirements of the Fourth Amendment by labeling a political wiretap a national security wiretap. Thus, the factual predicate for petitioners' qualified immunity and retroactivity arguments has not been established on their motion for summary judgment.

Second, petitioners violated law that was clearly established in 1969 by failing to observe the reasonableness requirement of the Fourth Amendment. Thus, the legal predicate for petitioners' qualified immunity and retroactivity arguments is missing. Third, qualified immunity is an affirmative defense which requires a showing that the defendant acted in good faith. Although the Court of Appeals decision gives petitioners ample opportunity to make this showing on remand, the Court properly ruled that it has not yet been established on their motion for summary judgment.

### A. On A Motion For Summary Judgment, The Court Cannot Assume That The Halperin Wiretap Was Conducted For Valid National Security Purposes.

When this Court first applied the Fourth Amendment to nontrespassory wiretapping in *Katz* v. *United States,* 389 U.S. 347 (1967), it reserved judgment on whether the Fourth Amendment requires court-authorized warrants for national security wiretaps. *Id.* at 358 n.23[23] If the Halperin surveillance was not conducted for national security purposes, petitioners plainly violated clearly

[23]Footnote 23 in *Katz* states: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."

established law when they initiated and continued the wiretap without a warrant.

Since petitioners seek to prevail under the doctrines of qualified immunity and non-retroactivity on a motion for summary judgment, the evidence relating to the purpose of the wiretap must be viewed in the light most favorable to respondents. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Respondents contend that from the outset the tap was conducted for political reasons rather than to investigate unauthorized disclosures of classified information. There is, moreover, more than enough evidence in the record to support the Court of Appeals' refusal to resolve the dispute about the purpose of the wiretap on a motion for summary judgment. For example, there was only speculation tying Halperin to the leaks (I J.A. 173), and Kissinger knew that Halperin had no access to the published information on the Cambodian bombing raids. The record also demonstrates that Kissinger had been criticized for hiring Halperin (I J.A. 330-331; II J.A. 167-169, 196-199), and that on the same day Kissinger selected Halperin as a wiretap target, he also cut off Halperin's access to sensitive information so that he could not be the source of subsequent leaks. (I J.A. 214-215.) This evidence supports respondents' contention that Kissinger selected Halperin in order to bolster his own standing and deflect the criticism over his staff appointments.[24]

[24]There is also reason to question whether the entire wiretap program was initiated to investigate leaks. FBI records "reveal no case [between 1960 and 1972] in which the source of any leak was discovered by means of electronic surveillance." Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess., Book III, 321 (1976). Therefore, it is doubtful that in 1969 Hoover would have recommended wiretapping as "an effective method of determining the source of leaks." (Pet. Br. 2.) Further-

The leak investigation rationale has progressively less credibility for each day the wiretap continued. Throughout the entire life of the surveillance, petitioners obtained no information shedding any light on leaks, and the FBI officials conducting the surveillance made several recommendations to terminate it. (I J.A. 176, 183, 184, 206.) From the day the tap began, Halperin had no access to sensitive information, and four months later he resigned from the NSC staff. (I J.A. 214-215.) At that time, he became a consultant to the NSC, a job that involved no access to any classified information, and in May 1970 he resigned from that position. (I J.A. 216.) Thereafter, Halperin became increasingly involved in anti-war lobbying and the presidential campaign of Senator Muskie *(id.)*, and as the District Court found, there was "a seemingly political motive for the later surveillance and dissemination of reports." (Pet. App. 74a. *See* I J.A. 252-256.)

In view of this record, the Court of Appeals properly ruled that the District Court must determine the issue of whether the wiretap had a bona fide national security purpose. (Pet. App. 26a-28a.) Until that sharply disputed issue is settled, the factual predicate for petitioners' qualified immunity and retroactivity defenses is absent.[25]

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more, Nixon stated that he had always known that wiretapping was ineffective for that purpose: "The tapping was a very, very unproductive thing. I've always known that. At least, I've never, it's never been useful in any operation I've ever conducted." Statement of Information, House Committee on the Judiciary, 93d Cong., 2d Sess., Book VII, Pt. 4, 1754 (1974).

[25]To establish that a warrant was not required, petitioners must prove (1) that the Halperin wiretap was in fact a leak investigation, and (2) that leak investigations unrelated to foreign intelligence activities fall within the national security area reserved in *Katz*. Just as the Court of Appeals ruled in the unchallenged portion of its opinion that the national security proviso to Title III does not cover the Halperin wiretap unless it was conducted to protect national security information from foreign intelligence activities (Pet. App. 21a-28a), the *Katz* national

**B. The Court of Appeals Correctly Held That Petitioners Violated Established Law By Failing Even To Attempt To Conduct The Halperin Surveillance In Compliance With The Reasonableness Requirement Of The Fourth Amendment.**

There can be no doubt that it was established in 1969 that the reasonableness requirement of the Fourth Amendment applied to all wiretaps and that the Halperin surveillance violated this requirement, as the courts below found. Therefore, even if petitioners reasonably could have believed that a warrant was not required to initiate the Halperin wiretap, they cannot avoid liability for the unreasonable conduct of the surveillance under their theories of qualified immunity as a matter of law and non-retroactivity.

The Fourth Amendment contains "two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause." *Payton* v. *New York, supra,* 100 S. Ct. at 1379. It has long been recognized that "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." *Id.* at 1379 n.23, *quoting* Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 103 (1937).

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security proviso also would not cover the wiretap unless foreign espionage was involved. *See Giordano* v. *United States,* 394 U.S. 310, 314 (1969) (Stewart, J., concurring).

In *Olmstead* v. *United States,* 277 U.S. 438 (1928), the Court held that the Fourth Amendment did not prohibit non-trespassory electronic surveillance. However, in 1967, the Court explicitly overruled *Olmstead* and held that the Fourth Amendment protects the privacy of telephone conversations even from non-trespassory electronic surveillance. *Katz* v. *United States, supra,* 389 U.S. 347. Therefore, after *Katz,* all wiretapping was subject to the reasonableness requirement of the Fourth Amendment. Since *Katz* left open only the applicability of the Fourth Amendment warrant requirement, 389 U.S. at 358 n.23, there was not the slightest doubt that this wiretap, like all others, had to be reasonable.

The elements of Fourth Amendment reasonableness had been clearly spelled out prior to 1969 in the Court's decisions delineating permissible procedures for the conduct of electronic surveillance. In *Osborn* v. *United States,* 385 U.S. 323, 329-330 (1966), the Court condoned the use of an electronic surveillance device that was confined to "precise and discriminate circumstances. . . .for the narrow and particularized purpose of ascertaining the truth" of allegations of wrong-doing. In *Berger* v. *New York,* 388 U.S. 41, 57-60 (1967), the Court held that the Fourth Amendment requires that an electronic surveillance must be based on probable cause that a particular offense has been or is being committed. Application of these principles to national security wiretaps therefore requires that the surveillance be conducted for the purpose of obtaining national security information and that there be probable cause to believe that such information will be obtained.

*Berger* also held that in order for a surveillance to be reasonable, it must be aimed at specific communications relevant to the investigation and not be "a roving commission to 'seize' any and all conversations." 388 U.S. at 59. The surveillance must be minimized to avoid interception

of non-pertinent conversations of the target and conversations of other persons unrelated to the investigation. The surveillance must also be limited in time, and there must be periodic renewals based on new showings of present probable cause for the continuation of the surveillance. *See Katz* v. *United States, supra,* 389 U.S. at 354-357.

With respect to the Halperin wiretap, summary judgment in petitioners' favor is inappropriate as to each one of these clearly established elements of reasonableness. First, the record indicates that the wiretap could have been undertaken for improper political purposes rather than to serve any legitimate intelligence purpose. Second, there was no probable cause but only "speculation" to believe that Halperin was leaking classified information (I J.A. 173), and he had no access to the information concerning the secret bombing raids in Cambodia which appeared in the New York Times and triggered the wiretap. (I J.A. 214.) Furthermore, the FBI memo to the Attorney General requesting authorization to tap Halperin stated that previous investigations "did not disclose any pertinent derogatory information." (I J.A. 177.)

Third, there were no reviews of the propriety or necessity of the surveillance during its twenty-one month life — even though Department of Justice regulations for national security wiretaps required reviews and reauthorizations every ninety days (II J.A. 134-135) — and petitioners have conceded that they knew that the wiretap was producing no information relating to leaks. In Nixon's words, it amounted to "just gobs and gobs of material: gossip and bull. . . ." (Statement of Information, House Committee on the Judiciary, *supra,* Book VII, Pt. 4, 1754; II J.A. 98-99.) In Haldeman's view, there was "a substantial amount of irrelevant information." (II J.A. 301.) According to Haig, Kissinger's deputy, much of what was reported was "garbage." (Haig Dep. 38.) In Kissinger's,

view, "very rarely did anything come in that was significant." (II J.A. 235.) Indeed, Kissinger concluded that the tap never produced any information indicating that Halperin was responsible for any leaks or casting any doubt on Halperin's "discretion or loyalty." (II J.A. 248, 253.) Nonetheless, petitioners never considered removing the tap (II J.A. 98, 100, 239, 240, 245, 291, 301, 308; Ehrlichman Dep. 24, 39-40; Haig Dep. 38.), and it ended only because the entire program was discontinued. (Report of the House Committee on the Judiciary, *supra* at 148-149.)

Fourth, there were no efforts to minimize the interception of conversations unrelated to leaking, and many irrelevant conversations were seized. The FBI monitors listened to all calls and logged 638 of them. Forty-three per cent of these were between third parties and Ina Halperin. Twenty-seven percent of the logged calls were husband-wife conversations between Ina and Morton Halperin. Only twenty eight per cent of the logged calls were between Morton Halperin and third parties, and these were not limited to conversations which touched on foreign policy issues and which conceivably could have led to the unauthorized disclosure of classified information. Even calls of the three Halperin children were logged on occasion.

To be sure, the requirements of Fourth Amendment reasonableness may vary depending on the circumstances of the surveillance. *Scott* v. *United States*, 436 U.S. 128 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 320 (1972). Here, however, petitioners made no effort whatsoever to minimize the scope or the duration of the surveillance. The Halperin wiretap was a deliberate and indiscriminate seizure of the "conversations of all persons. . . covered by the device." *Berger* v. *New York*, *supra*, 388 U.S. at 59. It was an unconstitutional general

search initiated and continued without probable cause or any effort at minimization. By their utter disregard for the reasonableness requirement of the Fourth Amendment, petitioners violated principles that were clearly established in 1969, and therefore they cannot prevail as a matter of law on qualified immunity or non-retroactivity grounds.

### C. Petitioners Have Failed To Establish The Absence Of Genuine Factual Disputes As To Whether They Conducted The Halperin Wiretap In Good Faith And Therefore They Are Not Entitled To Qualified Immunity.

In order to prevail under the affirmative defense of qualified immunity, petitioners must not only demonstrate that they violated no clearly established law, but also that they acted in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. *Gomez* v. *Toledo,* 100 S. Ct. 1920, 1924 (1980); *Procunier* v. *Navarette,* 434 U.S. 555, 561-562 (1978); *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975); *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247-248. The Court of Appeals properly remanded the case for further proceedings because it could not find that petitioners established the requisite good faith on their motion for summary judgment. Petitioners, however, contend that they should not be required to make any showing of good faith. (Pet. Br. 61-62.)[26]

[26]With the exception of the District Court's finding that petitioners did not establish good faith with respect to the continuation of the surveillance, they will have an opportunity to go forward with this defense as to all other aspects of respondents' claims. As a practical matter, very little is foreclosed on remand since petitioners will have an opportunity to establish a good faith defense to respondents' statutory claims and to the Fourth Amendment warrant issue, and to litigate the question of precisely when the wiretap became unreasonable. Furthermore, petitioner Kissinger has an opportunity to prove a good faith defense to all aspects of respondents' claims since the District Court's prior ruling did not apply to him.

In *Gomez* v. *Toledo*, the unanimous Court stated that "[t]he applicable test focuses not only on whether the official has an objectively reasonable basis for [his good faith] belief, but also whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right." 100 S. Ct. at 1924. In *Scheuer* v. *Rhodes*, the Court held: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, *coupled with* good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-248 (emphasis added). In *Wood* v. *Strickland, supra*, 420 U.S. at 322, supra, the Court held that a school official is not entitled to qualified immunity if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the rights of the student affected, *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." (emphasis added). The Court has also held that this same rule applies to federal officials, including cabinet officers. *Butz* v. *Economou, supra*, 438 U.S. at 498.[27]

A defendant cannot establish this subjective component of the qualified immunity defense if he "acted with such an

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[27]Petitioners rely heavily on *Procunier* v. *Navarette, supra*, 434 U.S. 555, for their contention that they need only show that they violated no clearly established law. (Pet. Br. 51.) *Procunier* involved an allegation that prison officials had negligently interferred with the constitutional rights of a prison inmate by failing to mail his correspondence. 434 U.S. at 556-559. The Court found that defendants were entitled to immunity under the first branch of the qualified immunity defense because a prisoner's right to free use of the mail had not been clearly established at the time of the alleged conduct. Notwithstanding this finding, the Court also addressed the second branch of the *Wood* v. *Strickland* standard. *Id.* at 566. However, the Court was able to find that defendants could not have intended to injure the plaintiff because they were only alleged to have negligently interferred with his mail. *Id.*

impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith," *Wood* v. *Strickland, supra,* 420 U.S. at 322, or if he "exhibit[ed] deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim. . . ." *Procunier* v. *Navarrette, supra,* 434 U.S. at 568 (Burger, C.J., dissenting). *See Butz* v. *Economou, supra,* 438 U.S. at 492 n.17. Therefore, even if an official can demonstrate that the rights which he is alleged to have violated are not clearly established, he still must demonstrate that he acted without an impermissible motivation or deliberate indifference to the risk of injuring the plaintiff.[28] In this case, the evidence of political rather than legitimate national security purposes behind the Halperin wiretap and of petitioners' indifference to the violation of respondents' privacy is sufficiently strong to preclude a finding of good faith on their motion for summary judgment.

Seeking to reverse this Court's recent precedents, petitioners suggest that the requirement of establishing good faith should be eliminated with respect to the President and those acting for him. (Pet. Br. 61.) This suggestion to radically revise the qualified immunity defense is unwarranted. In *Butz* v. *Economou, supra,* 438 U.S. at 507, the Court held that the qualified immunity defense was sufficient protection for federal executive officers up to the cabinet level. For all of the reasons set forth at pp. 39-54, *supra,* there is no need to fashion a different rule for the President. Under the sliding scale of qualified immunity, which increases the protection afforded officials according

[28]Conversely, if the official violated clearly established rights of which he knew or should have known – as appears to be the case here – he will be deprived of qualified immunity irrespective of any showing of good faith.

to the scope of their responsibilities and discretion, the President's burden of establishing good faith usually will be minimal and can be overcome only by the strongest showing of impermissible motivation, intent to cause harm, or reckless disregard for the consequences of his actions. The opportunity is open to petitioner Nixon to make the requisite showing on remand, and there is no need to change well-established rules.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

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